Supreme Court, U.S.
FILED
JUL 11 200
OFFICE OF THE CLERK

No. 00-1858

In The

Supreme Court of the United States

J. ALEX COTA,

Petitioner,

v.

DAVID SIMONTON, *THE DOCKET*, AN UNINCORPORATED ASSOCIATION, SUSAN WESTERBERG PRAGER AND BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Two

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CALVIN HOUSE,
Counsel of Record
GUTIERREZ, PRECIADO & HOUSE, LLP
251 S. Lake Ave., Ste. 520
Pasadena, CA 91101-3003
Telephone: (626) 449-2300
Fax: (626) 449-2330

JAMES E. HOLST
JOHN F. LUNDBERG
CHRISTOPHER PATTI
UNIVERSITY OF CALIFORNIA
1111 Franklin St., 8th Floor
Oakland, CA 94607
Telephone: (510) 987-9800

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

22 pp

QUESTIONS PRESENTED

1. This Court's jurisdiction over a state court decision only extends to review of federal questions that the state court necessarily decided. Should the Court grant certiorari to review a state court's determination that a plaintiff was a public figure where its decision rests on the adequate and independent ground that the offending statements were not defamatory under state law?

2. This Court has explained the principles used to determine whether an individual is a public figure several times since it introduced the concept to First Amendment jurisprudence in *Curtis Publishing Co. v. Butts*. Should the Court grant certiorari to consider the concept again in a case where the state court applied those settled principles, and held an individual to be a public figure who had injected himself into a controversy at a public university, and attempted to influence resolution of the issues involved?

3. This Court only has jurisdiction to consider issues that petitioner properly raised in state court. Should the Court grant certiorari to decide the constitutionality of a state statute, where the state appellate court did not pass on the issue because petitioner failed to press it in the trial court?

4. This Court has ruled that state regulation of the litigation process is constitutional so long as it does not obstruct the presentation of nonfrivolous legal claims. Should the Court grant certiorari to determine the constitutionality of California's anti-SLAPP statute, which

QUESTIONS PRESENTED – Continued

provides an expedited method for disposing of non-meritorious lawsuits that target actions in furtherance of free speech rights?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. The California anti-SLAPP statute 1

B. Mr. Cota's lawsuit 3

REASONS FOR DENYING THE WRIT 6

A. This Court does not have jurisdiction to review the California Court of Appeal's ruling that Mr. Cota was a public figure, because its decision rests on the adequate and independent state ground that the statements about Mr. Cota were not defamatory under California law 6

B. The California Court of Appeal's determination that Mr. Cota was a public figure does not raise an important federal question that merits this Court's review 7

C. Mr. Cota did not make a proper constitutional challenge to the California anti-SLAPP statute in the state court 10

D. Mr. Cota's challenge to the California anti-SLAPP statute does not raise a substantial constitutional question 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83 (1997) 10

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) 12

Bounds v. Smith, 430 U.S. 817 (1977) 12

Braun v. Chronicle Publ'g Co., 61 Cal. Rptr. 2d 58 (Ct. App. 1997) 1

Briggs v. Eden Council for Hope & Opportunity, 969 P.2d 564 (Cal. 1999) 13

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 13

Church of Scientology v. Wollersheim, 49 Cal. Rptr. 2d 620 (Ct. App. 1996) 2

College Hosp., Inc. v. Superior Court, 882 P.2d 894 (Cal. 1994) 2

Copp v. Paxton, 52 Cal. Rptr. 2d 831 (Ct. App. 1996) 5

Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967) 7, 9

Dameron v. Washington Magazine, Inc., 779 F.2d 736 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1141 (1986) 9

Daniels v. Williams, 474 U.S. 327 (1986) 11

Foster v. City of Lake Jackson, 28 F.3d 425 (5th Cir. 1994) 12

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 6

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) ... 5, 7, 9

Greenbelt Co-op. Pub. Ass'n v. Bresler, 398 U.S. 6 (1970) 7

TABLE OF AUTHORITIES – Continued

Page

Hutchinson v. Proxmire, 443 U.S. 111 (1979) 7

Illinois v. Gates, 462 U.S. 213 (1983) 10

Lafayette Morehouse, Inc. v. Chronicle Publ'g Co., 44 Cal. Rptr. 2d 46 (Ct. App. 1995) 2, 3, 14

Lerman v. Flynt Distrib. Co., 745 F.2d 123 (2nd Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985) 9

Lewis v. Casey, 518 U.S. 343 (1996) 12

Michigan v. Long, 463 U.S. 1032 (1983) 6

Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) 7

Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees, 82 Cal. Rptr. 2d 10 (Ct. App. 1999) 3

Robertson v. Rodriguez, 42 Cal. Rptr. 2d 464 (Ct. App. 1995) 3

Rosenthal v. Great Western Fin. Sec. Corp., 926 P.2d 1061 (Cal. 1999) 13

Silvester v. American Broad. Cos., 839 F.2d 1491 (11th Cir. 1988) 9

Sipple v. Foundation For Nat'l Progress, 83 Cal. Rptr. 2d 677 (Ct. App. 1999) 2

Thompson v. Boggs, 33 F.3d 847 (7th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995) 12

Time, Inc. v. Firestone, 424 U.S. 448 (1976) 7

Trotter v. Jack Anderson Enter., 818 F.2d 431 (5th Cir. 1987) 9

TABLE OF AUTHORITIES – Continued

Page

United Mine Workers of America v. Illinois State Bar Ass'n, 389 U.S. 217 (1967) 11

Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 898 (1980) 9

Wilcox v. Superior Court, 33 Cal. Rptr. 2d 446 (1994) ..2, 13

Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979) 7

STATUTES AND RULES

Cal. Civ. Proc. Code § 425.16 ..... 1, 2, 4, 10, 14

Fed. R. Civ. P. 56 13

Sup. Ct. R. 10 9

ARTICLES

Comment, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions*, 27 Cal. W.L. Rev. 399 (1991) 1

Penelope Canan & George Pring, *Strategic Lawsuits Against Public Participation*, 35 Soc. Probs. 506 (1988) 1

STATEMENT OF THE CASE

A. The California anti-SLAPP statute

SLAPP is an acronym for Strategic Lawsuit Against Public Participation.[1] It refers to a lawsuit that targets the exercise of the defendant's free speech rights. Concerned about the proliferation of SLAPP lawsuits and the resulting chill on the exercise of constitutional rights, the California Legislature enacted Code of Civil Procedure section 425.16. As the California Court of Appeal has explained, section 425.16 is designed to "nip SLAPP litigation in the bud," by promptly eliminating non-meritorious claims that fall within its purview.[2]

Under section 425.16, a SLAPP suit is subject to a special motion to strike, to be filed within 60 days after service of the complaint and heard within 30 days thereafter.[3] Initially, the movant must show that the SLAPP suit arises from an act "in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue." The burden then shifts to the plaintiff to establish a "probability" that he or she will prevail.[4] The prevailing party is entitled to attorney's fees and costs.[5]

---

[1] *See* Penelope Canan & George Pring, *Strategic Lawsuits Against Public Participation*, 35 Soc. Probs. 506 (1988); Comment, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions*, 27 Cal. W.L. Rev. 399 (1991).

[2] *Braun v. Chronicle Publ'g Co.*, 61 Cal. Rptr. 2d 58, 61 (Ct. App. 1997).

[3] Cal. Civ. Proc. Code § 425.16(f).

[4] Cal. Civ. Proc. Code § 425.16(b)(1).

[5] Cal. Civ. Proc. Code § 425.16(c).

The filing of a motion under section 425.16 stays all discovery. A plaintiff who needs discovery to establish probability of success may obtain it by showing good cause.[6] To show good cause, the plaintiff need only explain what additional information is sought, and how it bears upon the issues raised by the anti-SLAPP motion.[7] The trial court may continue the motion to a date beyond the time frame established in section 425.16 to allow the plaintiff to complete any necessary discovery.[8]

To establish a probability of success, the plaintiff need only "make a prima facie showing of facts which would, if proved at trial, support a judgment in plaintiff's favor."[9] This test "is similar to the standard applied to evidentiary showings in summary judgment motions . . . and requires that the showing be made by competent admissible evidence within the personal knowledge of the declarant."[10] In determining probability of success,

---

[6] Cal. Civ. Proc. Code § 425.16(g); *Church of Scientology v. Wollersheim*, 49 Cal. Rptr. 2d 620, 631 n.3 (Ct. App. 1996) ("the provision allowing discovery for good cause provides plaintiff a means to avoid any legitimate prejudice due to the alacrity of the proceedings").

[7] *Sipple v. Foundation For Nat'l Progress*, 83 Cal. Rptr. 2d 677, 690 (Ct. App. 1999) (denying discovery where "appellant does not explain what additional facts he expects to uncover, or why such far-ranging discovery is necessary to carry his burden of showing [defendant]'s malice").

[8] *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 44 Cal. Rptr. 2d 46, 54 (Ct. App. 1995).

[9] *Wilcox v. Superior Court*, 33 Cal. Rptr. 2d 446, 454 (1994).

[10] *Church of Scientology*, 49 Cal. Rptr. 2d at 635. *See also College Hosp., Inc. v. Superior Court*, 882 P.2d 894, 903 n.6 (Cal. 1994).

the trial court may not weigh the defendant's evidence against the plaintiff's, but may only determine whether the uncontroverted evidence defeats the plaintiff's claim, as a matter of law.[11]

On appeal from the grant of an anti-SLAPP motion, the "appellate court independently reviews the entire record to determine whether the plaintiff has made a sufficient prima facie case such that it would prevail in light of the applicable law regarding the complaint."[12]

B. Mr. Cota's lawsuit

According to Mr. Cota's complaint, he entered UCLA Law School in 1951-52, at a time when "Senator Joe McCarthy was a leading proponent of wild and unsubstantiated attacks upon the American government and the United States Army." He alleged that L. Dale Coffman, the first dean of the Law School, "was an ardent follower of Joe McCarthy and McCarthyism." After allegedly enduring a harangue by Dean Coffman in class, Mr. Cota spoke up against him. Dean Coffman allegedly retaliated against him by giving him a low grade, and by convincing other professors to give him low grades. As a result, Mr. Cota was not permitted to continue in the Law School. Since then, he has attempted unsuccessfully to gain readmission.[13]

---

[11] *Lafayette Morehouse*, 44 Cal. Rptr. 2d at 53.

[12] *Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees*, 82 Cal. Rptr. 2d 10, 14 (Ct. App. 1999). *See also Robertson v. Rodriguez*, 42 Cal. Rptr. 2d 464, 470 (Ct. App. 1995).

[13] Pet. App. 23-26.

In the spring of 1998, Mr. Cota contacted *The Docket*, the UCLA Law School student newspaper. He spoke with David Simonton, a co-editor-in-chief of the paper, who interviewed Mr. Cota over the telephone and in person, and reviewed many written materials that Mr. Cota supplied to him. After conducting some additional interviews, Mr. Simonton wrote an article entitled "The Strange Tale of J. Alex Cota" that appeared in *The Docket* in April 1998. Mr. Simonton reported Mr. Cota's claims, and then stated his opinion that Mr. Cota's evidence of wrongdoing was inconclusive.[14]

Mr. Cota retaliated a year later by filing a lawsuit, in which he claimed that Mr. Simonton had not been sufficiently sympathetic to his claims. His lawsuit also named the Regents of the University of California and Susan Westerberg Prager, who was the dean of UCLA Law School when the article appeared.[15] Defendants responded with a motion to strike under section 425.16.[16]

The Los Angeles Superior Court granted the motion after a hearing at which it determined that there was no probability that Mr. Cota could prevail on his claims.[17] The California Court of Appeal for the Second Appellate District affirmed in the decision that is the subject of Mr. Cota's petition for certiorari. Its opinion focused on five

---

[14] Pet. App. 59-69.

[15] Pet. App. 21-33.

[16] Pet. App. 44-69.

[17] Pet. App. 97-116.

statements that Mr. Cota claimed were defamatory (all of which are set out verbatim in that court's decision):[18]

- Three of the statements "were decidedly statements of opinion and not of fact."[19] Under state law, such statements are not defamatory.[20]

- Although the remaining two statements were factual, they were not defamatory. One was not false.[21] The other was at most false in its details and did not subject Mr. Cota to hatred or contempt.[22]

- The court also determined that Mr. Cota was a limited purpose public figure under the principles established in *Gertz v. Robert Welch, Inc.*[23] There was no evidence that defendants acted with actual malice.[24]

The California Supreme Court denied review of the Court of Appeal's decision on March 14, 2001.[25]

---

[18] *See* Pet. App. 5-8.

[19] Pet. App. 13.

[20] *See, e.g., Copp v. Paxton*, 52 Cal. Rptr. 2d 831, 838 (Ct. App. 1996).

[21] Pet. App. 16-17.

[22] Pet. App. 17-18.

[23] 418 U.S. 323 (1974).

[24] Pet. App. 18.

[25] Pet. App. 20.

REASONS FOR DENYING THE WRIT

A. This Court does not have jurisdiction to review the California Court of Appeal's ruling that Mr. Cota was a public figure, because its decision rests on the adequate and independent state ground that the statements about Mr. Cota were not defamatory under California law

Although the Court of Appeal ruled that Mr. Cota was a public figure, it also ruled that none of the five statements in Mr. Simonton's article that Mr. Cota found offensive were defamatory. It determined that three of them were statements of opinion, and not of fact. Although the other two were statements of fact, one was not false and the other did not subject Mr. Cota to hatred or contempt.

This Court does not have jurisdiction to review a federal question decided by a state court, if the state court's decision rests on an adequate and independent state ground.[26] Here, the Court of Appeal's ruling that the statements in question were not defamatory was not interwoven with its public figure ruling. It is clear on the face of the opinion that it was "alternatively based on bona fide separate, adequate, and independent [state law] grounds."[27] Therefore, this Court lacks jurisdiction to review the Court of Appeal's public figure ruling.

---

[26] *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983); *Fox Film Corp. v. Muller*, 296 U.S. 207, 209-11 (1935).

[27] *Michigan v. Long*, 463 U.S. at 1041.

B. The California Court of Appeal's determination that Mr. Cota was a public figure does not raise an important federal question that merits this Court's review

Although Mr. Cota asks this Court to review the California Court of Appeal's determination that he was a public figure, that ruling does not raise an important federal question that merits this Court's review. The Court extended the actual malice standard to defamation actions against public figures in *Curtis Publ'g Co. v. Butts*.[28] Over the ensuing years, the Court has explained what a public figure is several times.[29] The applicable legal principles are well settled:

> For the most part those who attain this status [of public figure] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.[30]

---

[28] 388 U.S. 130 (1967).

[29] *See Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz, supra*; *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6 (1970).

[30] *Gertz*, 418 U.S. at 345.

Here, the Court of Appeal adhered to those principles. It explained the law in terms consistent with this Court's decisions:

> An individual who voluntarily injects himself or is drawn into a particular public controversy thereby becomes a public figure for a limited range of issues. [Citation omitted]
>
> A three-step analysis is involved in determining whether an individual is a public figure for a limited range of issues. The courts must first find that there was a public controversy. Next, the courts examine whether the plaintiff undertook "some *voluntary* act through which he seeks to influence the resolution of the public issues involved." . . . Finally the alleged defamation must have been germane to the plaintiff's participation on the controversy.[31]

It then ruled that Mr. Cota was a public figure because he involved himself in a public controversy at UCLA:

> The issues of McCarthyism and retaliation against UCLA law students for their expression of political beliefs are matters of public controversy. Since appellant instigated the *The Docket* article and attempted to influence public opinion through it, we conclude that he is a public figure with respect to the subject matter of the article.[32]

The decisions that Mr. Cota claims establish a conflict in the law do not support his argument. In each of the cited cases, the court decided the public figure issue

---

[31] Pet. App. 14-15.

[32] Pet. App. 15.

according to the principles laid down in *Butts*, *Gertz* and this Court's other decisions.[33]

The Court of Appeal correctly determined that Mr. Cota was a public figure in accordance with this Court's rulings. Even if its determination were incorrect, the Court should still deny the petition: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."[34]

---

[33] *See Silvester v. American Broad. Cos.*, 839 F.2d 1491, 1494 (11th Cir. 1988) (basing decision on "the two basic *Gertz* criteria which distinguish public figures from private figures"); *Trotter v. Jack Anderson Enter.*, 818 F.2d 431, 433 (5th Cir. 1987) (public figures become such by "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," or because they "voluntarily inject [themselves] or [are] drawn into a particular public controversy"); *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 741 (D.C. Cir. 1985) (requiring "an inquiry into the plaintiff's voluntary actions that have caused him to become embroiled in a public controversy"), *cert. denied*, 476 U.S. 1141 (1986); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136 (2nd Cir. 1984) (question is "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation"), *cert. denied*, 471 U.S. 1054 (1985); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir.) (one is a public figure "if he is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants"), *cert. denied*, 449 U.S. 898 (1980).

[34] Sup. Ct. R. 10.

C. Mr. Cota did not make a proper constitutional challenge to the California anti-SLAPP statute in the state court

Although Mr. Cota asks this Court to consider the constitutionality of the anti-SLAPP statute, the Court of Appeal did not pass on that question because Mr. Cota did not press it in the trial court.[35] As a general rule, this Court "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review."[36]

Mr. Cota has not provided a convincing reason for the Court to depart from this settled rule. He concedes that he did not raise the issue in the trial court, but argues that it would not have been possible to do so until the court decided the motion.[37] He does not explain what prevented him from arguing in response to the motion that the statute's limits on discovery violated his constitutional rights.

---

[35] *See* Pet. App. 18 ("Finally, because appellant did not argue in the trial court that section 425.16 was constitutionally violative, and he has provided no authority for supporting his contention that section 425.16 violates either the First Amendment to the United States Constitution or article IX, section 9 of the California Constitution, we consider this issue waived").

[36] *Adams v. Robertson*, 520 U.S. 83, 86 (1997). *See also Illinois v. Gates*, 462 U.S. 213, 221-24 (1983) (applying the "not pressed or passed on below" rule to decline review of an issue not ruled on by the state court).

[37] Pet. 6.

D. Mr. Cota's challenge to the California anti-SLAPP statute does not raise a substantial constitutional question

Although Mr. Cota urges this Court to hold the anti-SLAPP statute unconstitutional, he has not cited any authorities that would support application of the constitutional provisions that he cites to a state's efforts to regulate SLAPP suits:

- The *Daniels* case (cited on page 14 of the Petition) involved a due process claim for personal injuries sustained when an inmate slipped on a pillow negligently left on a stairway by a sheriff's deputy. This Court ruled that the Due Process Clause does not impose a duty of due care on jailers. It did not say anything about a litigant's right to discovery in a defamation case.[38]

- The *Mine Workers* case (also cited on page 14 of the Petition) involved a state bar association ruling that barred a union from retaining staff attorneys to represent its members in workers' compensation proceedings.[39] The Court ruled that such actual interference with access to the workers' compensation system was unlawful.

This Court has held other restrictions invalid where they posed an obstacle to getting in the courthouse

---

[38] *Daniels v. Williams*, 474 U.S. 327 (1986).

[39] *United Mine Workers of America v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967).

door.[40] Plaintiffs in such cases must demonstrate that state action hindered their efforts to pursue nonfrivolous legal claims, and that they suffered actual injury.[41] This Court has never suggested that the First Amendment or the Due Process Clause limits a state's authority to impose limitations on the discovery process after plaintiff has been allowed to present his claim, or to establish procedures for expeditious resolution of meritless lawsuits. Although some courts of appeals have gone so far as to rule that active concealment of evidence may impose liability, no court has held that a mere failure to provide discovery constitutes unlawful interference with access to the judicial system.[42]

Here, the anti-SLAPP statute does not prevent plaintiffs with valid defamation claims from pursuing those claims in court. Anyone with a defamation claim may get in the courthouse door by paying the filing fee, as Mr. Cota did. If a defendant wishes to challenge a claim under the anti-SLAPP statute, it files a motion within 60 days after service of the complaint. The motion calls upon the plaintiff to present sufficient evidence to establish a prima facie case. Although the filing of the motion stays discovery, the plaintiff may still obtain discovery if necessary to establish a prima facie case.

---

[40] *Lewis v. Casey*, 518 U.S. 343, 350-54 (1996); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983); *Bounds v. Smith*, 430 U.S. 817, 821-23 (1977).

[41] *Lewis*, 518 U.S. at 350-54.

[42] *See Foster v. City of Lake Jackson*, 28 F.3d 425, 429-30 (5th Cir. 1994); *Thompson v. Boggs*, 33 F.3d 847 (7th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995).

The procedure is comparable to the summary judgment procedure under the Federal Rules of Civil Procedure. Under Rule 56, a defendant may move for summary judgment "at any time."[43] With a properly supported motion, the defendant puts the burden on the plaintiff to establish a prima facie case through admissible evidence.[44] If the plaintiff lacks the evidence necessary to respond to the motion, he or she may obtain a continuance of the motion to obtain discovery.[45]

In applying the statute, California courts have been sensitive to concerns about potential abuse of the procedure, and have avoided statutory constructions that would hamper litigants' rights:

> Anti-SLAPP legislation, therefore, must be fast, inexpensive and *constitutional* or it is of no benefit to SLAPP victims, the court or the public. In order to satisfy due process, the burden placed on the plaintiff must be compatible with the early stage at which the motion is brought and heard . . . and the limited opportunity to conduct discovery. In order to preserve the plaintiff's right to a jury trial the court's determination of the motion cannot involve a weighing of the evidence.[46]

---

[43] Fed. R. Civ. P. 56(b).

[44] *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

[45] Fed. R. Civ. P. 56(f).

[46] *Wilcox*, 33 Cal. Rptr. 2d at 454. *See also Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564, 574 (Cal. 1999) (section 425.16 includes "substantive and procedural limitations that protect plaintiffs against overbroad application of the anti-SLAPP mechanism"); *Rosenthal v. Great Western Fin. Sec. Corp.*,

Based on this Court's rulings and the protections incorporated into the anti-SLAPP procedure for litigants with nonfrivolous claims, there is no substantial basis for questioning the constitutionality of section 425.16.

CONCLUSION

This Court should deny Mr. Cota's petition for a writ of certiorari for the reasons explained above:

1. There is no jurisdiction to review the Court of Appeal's public figure ruling, because its decision rested on the adequate and independent ground that the statements in question were not defamatory under California law.

2. The Court of Appeal's public figure determination does not involve an important federal question that merits this Court's review.

3. The question of the anti-SLAPP statute's constitutionality was not pressed or passed on in the California state courts.

---

926 P.2d 1061, 1071 (Cal. 1999) (construing section 425.16 and similar statutes to require the court to determine only if the plaintiff "has stated and substantiated a legally sufficient claim"); *Lafayette Morehouse*, 44 Cal. Rptr. 2d at 52-54 (Ct. App. 1995) (considering constitutional challenge based on due process and equal protection).

4. Mr. Cota's constitutional challenge to the anti-SLAPP statute does not raise a substantial federal question. He has not provided any convincing authority for questioning the statute's constitutionality.

Respectfully submitted,

CALVIN HOUSE
Counsel of Record
GUTIERREZ, PRECIADO & HOUSE, LLP
251 S. Lake Ave., Ste. 520
Pasadena, CA 91101-3003
Telephone: (626) 449-2300
Fax: (626) 449-2330

JAMES E. HOLST
JOHN F. LUNDBERG
CHRISTOPHER PATTI
UNIVERSITY OF CALIFORNIA
1111 Franklin St., 8th Floor
Oakland, CA 94607
Telephone: (510) 987-9800

Counsel for Respondents